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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1513

LOUIS EDWARD BURGUENO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ
410 Douglas Building
Los Angeles, California 90012
Attorney for Petitioner

R. L. MIDDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1969. See Appendix B to this petition.

The Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to and including May 26, 1970. See Appendix C to this petition.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

(1) One constitutional question raised by petitioner is whether petitioner was deprived of that guaranty of "due process of law" insured by the Fifth Amendment and restated by the Act and the agency regulations which requires equal treatment, namely (in this context) equal physical examination.

(2) A second constitutional question involving the First Amendment, is petitioner's claim that "orthodox" standards of determination for a minister's draft classification were used and applied to an unorthodox religious ministry despite his prima facie case for such a classification.

These questions were raised by written motion in the trial court and briefing in the Court of Appeals.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, the First Amendment, and § 1 (c) of the Universal Military Training and Service Act of 1951 as amended (50 U.S.C.A. App.) and Selective Service System Regulation (32 C.F.R.) Section 1622.43. They are set forth in Appendix C.

5. STATEMENT OF THE CASE

The indictment charged petitioner with a violation of the Universal Military Training and Service Act for refusing to submit to induction.

Appellant pleaded "not guilty" and was tried by the Honorable Albert Lee Stephens, Jr., District Judge, jury trial having been waived. Appellant was found guilty and sentenced to imprisonment for a period of three years [TR 29].[1]

A written motion for judgment of acquittal was filed during the trial [TR 22].

6. FACTS

The facts are found in the complete Selective Service System file (the government's exhibit).[2]

Appellant registered with the Selective Service System on July 6, 1964 [Ex. 2]. He was given various classifications: I-O on October 2, 1964, II-A on December 11, 1964, I-O on August 13, 1965, I-Y on November 12, 1965, and I-O on April 13, 1967 [Ex. 3].

1. TR refers to the Transcript of Record.

2. Ex. refers to the government's exhibit, the complete Selective Service System file of the appellant.

Appellant, one of Jehovah's Witnesses, claimed both the IV-D ministerial classification, and the I-O Conscientious Objector classification [Ex. 7].

Appellant was denied the IV-D classification, but was classified in the I-O classification by his local board [Ex. 11-12], having filed his Special Form or Conscientious Objector [Ex. 16-21].

After a physical examination appellant was classified I-Y. He was again classified I-O, without another physical examination. Nor was he given a final physical inspection before he was ordered to perform civilian work.

In conformity with applicable law, appellant submitted an offer to perform suitable civilian work, to meet the requirement of his I-O classification. The Local Board met with him and with a Representative of the State Director and capriciously declined his offer [Ex. 56-67] and appellant was arbitrarily ordered to report for civilian work designated by the Selective Service System [Ex. 64].

7. REASONS FOR GRANTING WRIT

Both questions presented are of an importance greater than one individual's fate. The questions are national ones because the reach of the Selective Service System is into every hamlet, the "calls" for induction show every indication of continuing, and the percentage of registrants professing conscientious objections to war is not decreasing, therefore numerically many persons are affected.

The constitutional points are of grave importance and their wide impact upon registrants requires a national determination.

8. ARGUMENT

I

THE FIFTH AMENDMENT POINT

Petitioner Was Not Given Due Process

"'Due process' is a procedure which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial [or fair hearing]". *Sexton* v. *Barry*, 223 F. 2d 220, certiorari denied 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed.2d 76. Constitutional guaranty of "due process of law" requires observance of those general rules established in our system of jurisprudence for the security of private rights in any proceeding which may result in depriving a person of life, liberty or property. U.S.C.A., Const. Amend. 5; *U. S.* v. *Kuwabara*, 56 F. Supp. 716. The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. U.S.C.A., Const. Amend. 5; *U. S.* v. *Parcels of Land in Prince George's County, Md.*, 40 F.Supp. 436. In regard to "due process," it should be pointed out that the constitutional provision for security of person and property should be liberally construed. U.S.C.A., Const. Amends. 4, 5; *U. S.* v. *Wheeler*, 149 F. Supp. 445.

With the above in mind, petitioner contends that he was deprived of that guaranty of due process of law insured to him by the Fifth Amendment and the general rules of our system of jurisprudence.

Petitioner originally failed his physical examination [Ex. 34, 36] and was classified I-Y [Ex. 11]. Without justification shown he was again re-classified I-O. I-Y is "lower" than I-O and all registrants must be classified in the "lowest" classification they fit [§ 1623.2].

The record is clear. After his re-classification of I-O petitioner was not given a final physical inspection, nor was there an equivalent.

The applicable law requires "equal" treatment to all registrants. The act uses the expression "a system of selection which is fair and just" [§ 1 (c)]. The regulations, on our specific subject, are explicit, as we shall point out.

If the law had failed to specify a physical examination for I-O registrants, giving no reason, there concededly would be an implication that the omission was because it was believed that I-O registrants would be subject to different stresses in civilian work than I-A and I-A-O registrants in the armed services; also, if the law had specified a different type of examination for I-O registrants, we would then have a clear indication of legislative or administrative intent to make a distinction in processing.

But where, as here, we have the identical examination specifically required of Class I-A, Class I-A-O and Class I-O registrants (§ 1623.3, C.F.R.) and where, as here, the petitioner has already been given one of these identical armed forces type examinations we have left only the question of its validity as affected by expiration of time or by the required final "inspection."

The governing regulations are both civilian and military.

Section 1622.1, subsection (b) specifies that all registrants are to be processed in the "spirit" of the Act of Congress, namely, equality of privileges. Subsection (d) specifies that none is to be discriminated against because he belongs to a particular class. This certainly covers

conscientious objectors. The Act requires that all be done "in accordance with a system of selection which is fair and just." (§ 1 (c)).

Then, with respect to physical examination the procedures set forth are spelled out and *no* distinction is made between registrants ordered to report for civilian work (Class I-O) and registrants ordered to report for induction (Class I-A-O and Class I-A). Subsection 1623.3 says:

"PHYSICAL EXAMINATION

"Physical examination of registrants classified in Class I-A, Class I-A-O, or Class I-O shall be accomplished under the provisions of part 1628, of this chapter."

Next, we see Subsection 1628.10. It has two significant words: "every" with respect to registrants, thus showing that it was intended that every registrant was to be examined, as provided; and "shall" was used, making the procedure mandatory.

"ARMED FORCES PHYSICAL EXAMINATION.

"1628.10 Who Will Be Examined—

Every registrant, before he is ordered to report for induction, or *ordered to perform civilian work* contributing to the maintenance of the national health, safety, or interest, *shall* be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination." (Emphasis supplied.)

Since petitioner is neither a delinquent nor a volunteer, there can be no question but that Section 1628.10 applied to him.

Finally, § 1660.20 (a) shows specifically that I-O registrants are to be treated like and processed like the I-A registrants, with respect to terminal processing after the physical examination.

> "1660.20. DETERMINATION of Type Civilian Work to Be Performed and Order by the Local Board to Perform Such Work—
>
> (a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

Fairness requires equality in the regulations. Even-handed administration of the law by this agency should be its practice, as well as its written procedures. Let us examine the written procedures further. With respect to Order of Call the intent of the top level of the agency is that even-handed procedures be followed. First, note the statement in the 1959 Annual Report of the Director of the Selective Service, at page 25:

"Both the I-O's and I-A-O's are subject to the same sequence of induction as the I-A's and the regulations concerning extension of liability and the induction of fathers applies equally to them."

The year earlier, the 1958 Report at page 24 phrases it:

"The same sequence for forwarding I-A's for induction applies to the I-O's."

Then, to finalize this top-level, generalized interpretation consider the explicit statement and specific application in the Director's letter of November 28, 1960:

"Reexamination of registrants . . . applies to registrants who are classified in Class I-O."

Basic procedural fairness and equality of treatment, rights guaranteed to the petitioner by the Constitution, required that he be given a final physical inspection. Petitioner was not given a final physical inspection, an inspection that might have found him unfit for induction. Thus petitioner should not have been convicted. *Briggs* v. *United States*, 397 F.2d 370, 9th Cir. (1968).

II

THE FIRST AMENDMENT POINT

Our Argument Turns on the Denial of the IV-D Classification in That "Orthodox" Standards Were Used, Ones Not Contemplated by the Pertinent Law

The Selective Service System regulation defines minister as follows:

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church . . . and does not include any person . . . who does not regularly, as a

vocation, teach and preach the principles of a religion. . . ." 32 C.F.R. § 1622.43 (b) (3).

Petitioner stated and demonstrated that he worked at secular activity only to earn a living and that his life work was to be a minister. Being a minister was his vocation, this was his position and that of his Church. Petitioner worked a minimum of 14 hours each week at his religious work [Ex. 57].

When he first filed his Selective Service System Classification Questionnaire [Ex. 4] on September 3, 1964, petitioner stated that he was a student preparing for the ministry under the direction of the Watch-Tower Bible and Tract Society [Ex. 7]. By 1967, the Selective Service System itself had recognized that he was doing ministerial work. At an interview with his Local Board, Mrs. Kathryn Roberts, a representative of the State Director, said to petitioner, "Selective Service does not deny that you are a minister in the eyes of your church; . . ." [Ex. 57].

Although petitioner's IV-D ministerial claim was rejected, petitioner contends that he presented a prima facie case for a IV-D classification. He claims that "orthodox" standards of determination for a minister's draft classification were used and applied to an unorthodox religious ministry despite the prima facie case presented for the IV-D classification. Such action is contrary to the First Amendment right of freedom of religion.

The local board's duties and the courts' scope of review in draft cases were spelled out by this Court in *Dickinson* v. *United States*, 74 S.Ct. 152, 157, 158, 346 U.S. 389 (1953):

"The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply the test of 'substantial evidence'. However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."

". . . when the uncontroverted evidence supporting the registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The dissenting opinion of Mr. Justice Jackson put the proposition more bluntly (74 S.Ct. 152, 159):

". . . Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case. . . ."

Thus the Selective Service System cannot deny a classification when a prima facie case has been presented unless it has a rational basis for doing so and states the reasons for doing so. *United States* v. *James*, 417 F.2d 826, 4th Cir. (1969); *Haughton* v. *United States*, 413 F.2d 736, 9th Cir. (1969).

The Selective Service System also cannot require the unorthodox religions to meet orthodox religious standards. *United States* v. *Seeger*, (1965) 380 U.S. 163, 13 L.Ed.2d 733, 85 S.Ct. 850. Such action would be contrary to the guarantees of the First Amendment. This was done in the case of petitioner.

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

J. B. TIETZ
410 Douglas Building
Los Angeles, California 90012
Attorney for Petitioner

APPENDIX A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
LOUIS EDWARD BURGUENO,
Defendant-Appellant.

No. 24,614

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

(Filed March 24, 1970)

Before: MERRILL, ELY and TRASK, Circuit Judges

Per Curiam:

Appellant, classified I-O, failed to report for civilian work in lieu of induction, for which he was convicted under 50 U.S.C.App. §462.

We find nothing whatsoever wrong with the local board's refusal to accept appellant's adamant insistence upon continuing employment with Douglas Aircraft, nor its choice of the Los Angeles County Department of Charities, nor with its receiving guidance through the State Director's list of approved jobs. *Burton* v. *United States*, 402 F.2d 536 (9th Cir. 1968), *cert. denied*, 393 U.S. 1089 (1969); *Mang* v. *United States*, 339 F.2d 369 (9th Cir. 1964).

Since appellant was not undergoing induction he was not entitled to the army's final physical inspection. See

Briggs v. *United States*, 397 F.2d 370, 373 n.3 (9th Cir. 1968).

Appellant did not make out a prima facie case for a ministerial classification. *Daniels* v. *United States*, 404 F.2d 1049 (9th Cir. 1968); *Langhorne* v. *United States*, 394 F.2d 129 (9th Cir. 1968). He had a full-time job with Douglas Aircraft and spent about fourteen hours a week on religious work for Jehovah's Witnesses.

Any lack of notice of earlier classifications was without prejudice since appellant was properly notified of his final classification.

Judgment affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, March 24th, 1970
Before: MERRILL, ELY and TRASK, Circuit Judges

Order Directing Filing of Opinion and Filing and Recording of Judgment

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

APPENDIX C

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

> "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 1625.2 of the Selective Regulations (32 C.F.R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

> *"When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment. if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided*, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."